

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.**

In the Matters of

Service Rules for Advanced Wireless
Services in the 2155-2175 MHz Band

WT Docket 07-195

Service Rules for Advanced Wireless
Services in the 1915-1920 MHz, 1995-2000
MHz, 2020-2025 MHz and 2175-2180 MHz
Band

WT Docket 04-356

**Reply Comments of the
Information Technology Association of America**

The Information Technology Association of America (“ITAA”) hereby replies to the comments filed in response to the Commission’s Notice of Proposed Rulemaking in the above-captioned matter. As discussed below, ITAA supports those commenters that urge the Commission not to impose a mandatory filtering requirement.¹

ITAA is the premier information technology and electronics industry association working to maintain America’s role as the world’s innovation

¹ ITAA has not taken a position on the merits of creating a free broadband network using spectrum, and is not replying to the comments that address that issue.

headquarters. ITAA provides leadership in market research, standards development, business development, networking, and public policy advocacy to some 350 corporate members doing business in the public and commercial sector markets. These members range from the smallest start-ups to industry leaders offering Internet, software, services and hardware solutions. ITAA's members include a significant number of information service providers ("ISPs"). During the last three decades, ITAA (and its predecessor, ADAPSO) has participated actively in Commission proceedings governing the development of the Internet and information services market. ITAA has consistently supported pro-competitive policies that will enable businesses and consumers to realize the full benefits of information technology.

As ITAA has long recognized, the Internet is a critical information resource that enables global supply chains and facilitates global markets for goods and services, allowing every business to compete globally. The Internet also provides significant benefits to domestic consumers by allowing provision of new services such as e-government, e-commerce, telemedicine and distance learning. However, businesses and consumers can only realize these benefits if they have affordable access to broadband Internet access services. Wireless technology can play an important part in promoting widespread affordable deployment of such broadband access services. ITAA, therefore, strongly supports the use of spectrum to provide broadband services-- and opposes any government policies that would needlessly

delay or encumber the use of radio spectrum that could be used to offer such services.

The comments filed in this docket demonstrate that the Commission's proposed filtering mandate -- even if narrowed or subject to opt-out or opt-in procedures -- would raise substantial constitutional and statutory issues. Indeed, as the Joint Public Interest and Industry Comments, to which ITAA is a signatory, observed, the proposed filtering mandate "would certainly be the target of one or more legal challenges."²

As the Joint Comments demonstrate, if the Commission imposes the filtering requirement, parties are certain to challenge the requirement as a violation of the First Amendment. Specifically, parties are likely to challenge the Commission's requirement that licensees block access to content that is "pornographic" but not "obscene" or that would be "harmful" to a five-year-old child.³ Even if the Commission were to narrow the category of content that it seeks to restrict, this will not eliminate the likelihood of a legal challenge. Rather, because of the availability of user-controlled filtering software, parties would be certain to argue that *any* government-imposed filtering requirement does not satisfy the requirement that government use the "least restrictive means" to further whatever legitimate

² Joint Public Interest and Industry Comments., July 25, 2008 ("Joint Comments") at 16.

³ *See id.* at 13.

government interest may exist.⁴ Given the complexities of First Amendment doctrine, any court decision would inevitably be appealed -- and, ultimately, might require Supreme Court resolution, a process that could delay --for years the use of this spectrum to provide broadband services.

The adoption of opt-in or opt-out procedures, whatever their merits may be, would not reduce the likelihood of legal challenge. To the contrary, adoption of such procedures -- which would require the Commission or the licensee to designate specific sites as subject to filtering -- would certainly “bring constitutional challenges . . . for improper and unconstitutional inclusion of a particular website” on the restricted list.⁵

Finally, any filtering mandate would also be challenged on statutory grounds. The Commission’s legal authority to impose the filtering requirement is, at the least, highly questionable. Indeed, Section 326 of the Communications Act, 47 U.S.C. § 326, expressly prohibits the Commission from “interfer[ing] with the right of free speech by radio communications.” Consequently, if the Commission adopts the filtering requirement, it will need to expend significant time and resources to defend itself against claims that it has acted in excess of the authority that Congress has delegated to it.

ITAA cannot predict how the courts would rule on any particularly challenge -- although the legal arguments against imposing the filtering requirements appear

⁴ *See id.* at 5.

⁵ *Id.* at 13

strong. Whatever the merits of these arguments may be, one thing is certain: protracted litigation would “burden the proposed network with . . . unavoidable delay.”⁶ In the interim, valuable spectrum -- which could be used to provide broadband connectivity -- would remain unused.

There is no reason for the Commission to allow this valuable resource to lie fallow. Rather than imposing a filtering requirement of questionable legality, the Commission should rely on the availability of user-controlled filtering software. This approach would enable parents to protect their children from content that the parents -- rather than the government -- determine is not suitable. At the same time, relying on user-controlled filtering would completely eliminate the risk of First Amendment and statutory legal challenges that would prevent the use of valuable spectrum to provide broadband connectivity to the Internet.

⁶ *Id.* at 16.

CONCLUSION

For the foregoing reasons, the Commission should not impose a mandatory filtering requirement -- or take any other actions that could delay the availability of new spectrum for the provision of broadband services.

Respectfully submitted,

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